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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 208.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE CHICOPEE BANK, PLAINTIFF IN ERROR,

vs.

THE SEVENTH NATIONAL BANK OF PHILADELPHIA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

FILED DECEMBER 10, 1867.

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1 UNITED STATES, *ss:*

The President of the United States to the judges of the Circuit Court holden in and for the district of Massachusetts, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between the Seventh National Bank of Philadelphia, plaintiff, and the president, directors, and company of the Chicopee Bank, defendants, in a plea of the case, a manifest error has intervened to the great damage of the said president, directors, and company of the Chicopee Bank, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and the associate justices of the Supreme Court of the United States on the first Monday of December next, at Washington, being the present seat of the national government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Salmon P. Chase, esquire, Chief Justice of the said Supreme Court at Washington aforesaid, this thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-second.

JOHN G. STETSON, *clerk.*

Allowed by: JOHN LOWELL, *Judge.*

2 CIRCUIT COURT OF THE UNITED STATES, *District of Massachusetts, ss:*

And now here the judges of the Circuit Court of the United States, in and for said district, make return of this writ, by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof I, John G. Stetson, clerk of said Circuit Court, have hereunto set my hand and the seal of said court, this thirtieth day of November, A. D. 1867.

[SEAL] JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, *Massachusetts District, ss:*

At a Circuit Court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Tuesday, the 15th day of October, in the year of our Lord one thousand eight hundred and sixty-seven, before the Honorable Nathan

Clifford, associate justice, and the Honorable John Lowell, district judge.

THE SEVENTH NATIONAL BANK OF PHILADELPHIA, a corporation duly organized and created by law, and having its place of business in Philadelphia, in our district of Pennsylvania, and whose stockholders are all residents of said district of Pennsylvania, plaintiffs,

vs.

4 THE PRESIDENT, DIRECTORS, AND COMPANY OF THE Chicopee Bank, a corporation duly created by law and having its place of business in said district of Massachusetts, and whose stockholders are resident in said district of Massachusetts, defendant.

In a plea of the case: for that the plaintiffs on the thirteenth day of February, A. D. 1865, were the owners of a certain bill of exchange drawn by one S. B. Coughlin, on Montague & Son, of Springfield, Massachusetts, for ten thousand dollars, dated Springfield, Feb. 11, 1865, payable five days after sight to the order of Charles C. Rhodes, at the Chicopee Bank, accepted by Montague and Son, and endorsed to the plaintiffs for value by the said Charles C. Rhodes; and the plaintiffs transmitted said bill to the defendants for collection on the thirteenth day of February, and the deft's duly received the same by due course of mail in season to present the same for payment to the acceptors before the same became due, and the defendants promised, and undertook, and were bound by law and the usage of banks, and it was their duty to demand of the acceptors the payment of said bill on the day it became due, and if not paid by the acceptor, to

5 give notice of its non-payment to the said drawer and endorser, but said defendant wholly neglected his said duty in the premises, and did not present said bill for payment until long after it became due, when payment was refused; and by reason of the defendants' negligence as aforesaid, the plaintiff lost all remedy against the drawer and endorser of said bill, who refuse to pay the same, and they have been unable, notwithstanding every effort, to collect anything from the acceptors, who are insolvent and unable to pay said bill, to the damage of the said plaintiffs, as they say, the sum of twenty thousand dollars.

The writ in this action is dated the sixteenth day of March, A. D. 1866, and was duly entered at the May term of this court, A. D. 1866, when and where the parties appeared by their respective attorneys; this cause was thence continued from term to term to this present October term, A. D. 1867, when the following plea and issue is filed, namely :

THE SEVENTH NATIONAL BANK OF PHILADELPHIA
vs.
THE PRESIDENT, DIRECTORS AND COMPANY OF THE Chicopee Bank.

Defendant's plea.

6 And the defendants come and defend, &c., when &c., and say that they are not guilty in manner and form as the plaintiffs have thereof in their said declaration complained against them; and of this they put themselves upon the country.

By their attorney, H. H. COOLRIDGE.

And the plff's doth the like, by their attorney,
GEO. PUTTNAM, JR.

Issue being thus joined, the cause, after a full hearing, is committed to a jury sworn according to law to try the issue, who, after hearing all matters and things concerning the same, to wit, November 1st, return their verdict therein, and upon oath say: The jury find that the defendant is guilty in manner and form as the plaintiffs hath thereof alleged against it, and assess damages in the sum of ten thousand nine hundred and seventy-five dollars. And now, to wit, November 30th, 1867, on motion of the plaintiff that judgment be entered on the verdict with interest, said motion is allowed, and it is considered by the court that the said Seventh National Bank of Philadelphia, plaintiff, recover of the said president, directors, and company of the Chicopee Bank, defendants, the sum of eleven thousand and eighteen dollars and ninety cents damages, together with costs of suit, taxed at two hundred and forty-four dollars and forty-eight cents.

7 Upon the trial of the said cause, after the evidence was closed and before the jury left the bar, the said president, directors, and company of the Chicopee, defendants, filed their bill of exceptions, which was sealed and allowed by the court, and is in words and figures following, namely:

Be it remembered that at the trial of the above-entitled cause before a jury empanelled for that purpose, it appeared that the plaintiffs are a bank of Philadelphia, and the defendants are a bank of Springfield, Massachusetts. A bill of exchange was drawn at said Springfield on the eleventh of February, 1865, by S. B. Coughlin, of Philadelphia, but then at Springfield, on Montague & Son of said Springfield, for ten thousand dollars, at five days' sight, payable to the order of Charles C. Rhodes, at the defendant bank, and accepted by Montague & Son on the same day.

On the thirteenth day of February, the bill was brought to the plaintiff bank by the said Rhodes, endorsed by himself. The bill was due on the nineteenth of February, and that being Sunday, it was payable on the eighteenth.

The plaintiffs offered evidence tending to show that the transaction of the thirteenth was an actual discount for full value;
8 that Rhodes was credited with ten thousand dollars, and in

the course of that day drew checks for $250, $10,000, $153 31, and two checks amounting to $1,700, and deposited—besides the $10,000, $1,500—his balance at the beginning of the day was $584 36, and received the money for said checks.

The cashier of the plaintiff bank, Mr. E. S. Hall, who was a witness, said that the reason why no deduction was made for interest and exchange was because this was their first transaction with Springfield, and they did not know what the exchange might be. He testified that Rhodes had large dealings with the bank; that Coughlin was a director; that he was well acquainted with him; that both were frequently at the bank; that on the same day, namely, the thirteenth of February, he endorsed said draft to the cashier of the defendant bank for collection, and that the same was mailed on that day, enclosed in a letter to the said cashier as follows: "I enclose for collection and ret. Montague & Son, accept. $10,000, five days' sight. If you prefer, you may discount above and remit net proceeds." It appeared that the usual course of mail between Philadelphia and Springfield was such that a letter would be received before
9 noon of the second day after it was mailed. Mr. Hall also testified that he placed the letter with our regular mail for the afternoon of that day; that they had but one mail a day; that it was usually ready between 4 and 5 o'clock; that the mail is taken by one of the clerks between 4 and 5 o'clock. He also testified that he put another letter addressed to other parties in Springfield with the same mail with which he put the letter to the defendants enclosing the draft, and it was proven by other uncontradicted evidence that the letter to the other parties was duly received by them in the regular course of the mail on the 15th of February. He further testified that he expected to receive an answer acknowledging the receipt of his letter to the defendants on the 17th, but said that he frequently heard nothing from short paper till the amount was remitted, and that it was the custom of some banks not to acknowledge the receipt of short paper sent for collection till the amount was remitted; and for that reason he did not telegraph. He said he thought of the letter, and felt some anxiety at not hearing from it, but supposed it was the custom of the defendants not to answer such letters till they remitted. He did nothing on the 17th; on the 18th he spoke to the president about it, but nothing was done. The 19th was
10 Sunday. On Monday, the 10th, he telegraphed to the cashier of the defendant bank: "Did you receive ours of the 13th inst., with Montague's acceptance, $10,000?" To which the defendant's cashier, Mr. Warner, replied by telegraph as follows: "Not yet received." And this reply was received by Mr. Hall at noon on the same day. No further or other communication was ever made by the defts to the pl'ffs in relation to the draft, except such as is hereinafter recited. Mr. Hall testified that he wrote to Mr. Rhodes on the same day informing him of what he had learned, and requesting him to get a duplicate of the draft; that he knew that Rhodes and Coughlin were concerned in dealing in petroleum oil lands, and that he presumed Rhodes would inform Coughlin; that he had no re-

collection of writing to Coughlin. There was evidence that Rhodes made a deposit in the bank on the 20th. On the 20th Mr. Hall also wrote to Mr. Warner the letter here inserted and marked (5.) All the correspondence is here inserted.

(1.)

$10,000. SPRINGFIELD, *Feb'y 11th*, 1865.

Five days after sight pay to the order of Charles C. Rhodes ten thousand dollars, at the Chicopee Bank, value received, and charge the same to account of

S. B. COUGHLIN.

To Montague & Son, Springfield, Mass.

Accepted Feb'y 11th, '65.

MONTAGUE & SON.

[$5 int. rev. stamp, cancelled.]

11 With endorsement on the back as follows, namely: Charles C. Rhodes, pay to Thos. Warner, jr., esq., cashier, or order, for collection and credit of .

(2.)

PHILADELPHIA, *Feb'y* 13, 1865.

T. Warner, jr., esq., cashier, Springfield:

SIR: I enclose for collection and ret. Montague & Son accept. $10,000, five days' sight. If you prefer you may discount above and remit proceeds.

Respectfully yours,

E. S. HALL, *Cashier.*

(3.)

[Telegram.]

PHILA., 20*th* 186 .

To T. Warner, jr., cash.

SIR: D'nt you receive ours of thirteenth instant with Montague's acceptance, ten thousand dollars?

E. S. HALL, *Cash.*

¼.66.

(4.)

[Telegram.]

12 SPRINGFIELD, *Feb.* 20*th.*

To E. S. Hall, cash., Ph'a:

Not yet received.

T. WARNER, JR., *Cash'r.*

(5.)

SEVENTH NAT. BANK, *Philadelphia, Feb 20th*, 1865.

T. Warner, jr., esq., cashier, Springfield, Ms.:

SIR: Your answer to my telegram reached me at noon to-day. I sent you on the 13th inst. for collection Montague & Son's acceptance of S. B. Coughlin's draft, favor of C. C. Rhodes, for $10,000, Feb'y 11th, at five days' sight, payable at your bank. I endorsed it payable to your order. I notified the postmaster here that the letter was missing. If it does not reach you regularly, please stop payment and I will obtain a duplicate as soon as Mr. Coughlin reaches the city.

Respectfully yours,

E. S. HALL, *Cashier.*

(6.)

SEVENTH NAT. BANK, *Philadelphia, Mch.* 2, 1865.

T. Warner, jr., esq., cashier, Springfield:

13 SIR: I have not yet been able to obtain duplicate of Montague & Son's acceptance lost in the mail. Should the original draft reach you in a regular way please collect it and forward me the proceeds.

Respectfully yours,

E. S. HALL, *Cashier.*

(7.)

SEVENTH NAT. BANK,
Philadelphia, March 23rd, 1865.

T. Warner, jr., esq., cashier, Springfield:

SIR: Can you inform me if the draft for $10,000, (Montague & Son,) miscarried in the mail, and of which I wrote you some time since, will be paid when presented.

The endorsers say that they have been unable to get a duplicate. Can you ascertain if there is any difficulty about it? It was payable at your bank. Your attention will oblige.

Respectfully yours,

E. S. HALL, *Cashier.*

(8)

P. F. Wilcox, president; capital stock, $300,100; T. Warner, jr., cashier.

14 CHICOPEE BANK,
Springfield, Mass., 24th Mar., 1865.

E. S. Hall, esq., cashier:

DEAR SIR: The acceptance of Montague & Sons for $10,000, sent to me for collection has not yet made its appearance, and I am informed by Mr. Montague that it will not be paid when presented.

Yours, resp'y,

T. J. WARNER, JR., *Cash.*

(9.)

P. F. Wilcox, Pres.; capital stock. $300,100; T. Warner, jr., cash.

CHICOPEE BANK,
Springfield, Mass., Apr. 18th, 1865.

E. S. Hall, esq., cashier:

DEAR SIR: Yours of the 13th Feb., with enclosure, has just come to light, but I am unable to say when received. In some way unaccountable your letter found its way into one of the drawers of my desk, where it was found whilst overhauling the drawer for some papers which we were in search of. The probability is that it fell through a crack or crevice in the top of my desk into the drawer, when brought in from the post office, and thrown down upon
15 the desk by my clerk. The d'ft has been presented to the acceptors, and I am informed by them that it has been settled by them with the parties to whom it was given.

I return the acceptance enclosed.

Yours truly,

T. WARNER, JR., *Cash.*

(10)

PHILADELPHIA, *Ap'l* 20, 1865.

T. Warner, jr., esq., cashier, Springfield:

SIR: Your favor of the 18th inst., with enclosures as stated, is received, and has attention. I return for collection Coughlin on Montague, $10,000.

If Montague will not pay please have the accept'n protested. The endorser says, "such a statement is not true; no such settlement has ever been made." We cashed this draft, and have been out of the money ever since. We regret the loss, as we have written to all the Springfields in the U. S., and were waiting to hear from the dead letter office when your letter arrived.

Respectfully yours,

E. S. HALL, *Cashier.*

(11.)

CHICOPEE BANK,
16 *Springfield, Mass., April* 22, 1865.

E. S. Hall, esq., cashier:

DEAR SIR: I return under protest Montague & Son's acceptance, $10,000; costs $2 28-100.

Resp'y yours,

T. WARNER, JR., *Cashier.*

(12.)

SEVENTH NAT. BANK,
Philadelphia, Ap'l 27, 1865.

T. Warner, jr., esq., cashier, Chicopee Bank, Springfield, Mass.:

DEAR SIR: I received your favor of the 22nd inst., covering a protest of draft of S. B. Coughlin's on Montague & Son.

I note the charge of 2 28-100, and enclose the same herewith. This whole transaction has been so mismanaged by your bank as to occasion us a great loss, for which we will have to look to you.

Very resp., yours,

E. S. HALL, *Cashier.*

17 After this time, the 20th of Febuary, the plaintiffs were active in making inquiries for the lost letter at post offices in various Springfields in the country, and at the General Post Office. No other steps than above stated were taken by the plaintiffs towards fixing liability upon the drawer or endorser.

It was in evidence that Rhodes and Coughlin were each able to pay the bill at its maturity, and for several months afterwards. Mr. Warner, the defendant's cashier, testified as to the mode of receiving letters from the post, and disposing of the same in the bank, and that on the 18th of April, 1865, he found the letter of the plaintiff's cashier of Feb. 13th, with the bill enclosed.

Mr. Warner, the cashier of the Chicopee Bank, testified that his first knowledge of the draft was from Mr. Hall's telegram of the 20th of February, which he immediately answered as above set forth; that no funds were provided by the acceptors for the payment of this draft, nor did either of them come to the bank on the day the draft matured; that they kept an account with the bank but they had only a small deposit with the bank on that day; that the letters of the bank were commonly brought from the mail and laid on his desk; that the
18 desk had an incline top which was fastened down; from the upper side of this inclined top, a level space about six or eight inches wide extended back to an upright row of small drawers; underneath the whole top of the desk was a drawer in which waste papers of various kinds were kept; that on the 18th of April, 1865, in searching this drawer for some other paper of no value, he found Mr. Hall's letter of Feb. 13, unopened, with the draft enclosed; that at the point where the level part of the top of the desk came in contact with the upright drawers there was a crack through which the letter might have slipped; that the crack was so narrow that only a very thin letter could have slipped through, and that the said letter was thin enough to slip through, as he tried it; that on finding it he presented the draft to Montague for payment, which was refused; that he then returned it to the plaintiffs with the letter of April 18th, inserted above. Mr. W. E. Montague testified that he was the party against whom the plaintiffs had recovered judgment; that his son had died prior to said judgment; that he made no provision at the Chicopee Bank or anywhere else to pay the draft at maturity,

19 nor had he made any offer or attempt to pay it after maturity; that he did not go to the Chicopee Bank on the 18th or 20th of Feb., 1856, in reference to said draft, nor did his son, to his knowledge.

The plaintiffs have brought no suits against Rhodes or Coughlin; they brought suit against the acceptors and obtained judgment, which was not satisfied in any part, by reason of their insolvency.

The pl'ff's cashier replied Apr. 20th, returning the draft with the request that it should be duly protested; this request was complied with, and the draft returned.

In the course of the trial, for the purpose of proving that the letter of the 11th of February, enclosing the draft, was duly mailed on that day, the plaintiffs offered the deposition of Thomas S. Harris, a clerk in their bank; this deposition was taken by commission upon written interrogatories, and was as follows:

Deposition of Thomas S. Harris.

Int. 1. What is your name, age, residence, and occupation, and what were your residence and occupation in February, 1865?

Ans. My name is Thomas S. Harris. I am 26 years old. I live at No. 1326 Poplar st., Philadelphia. I am now treasurer of
20 the Lombard and South St. Passenger R. R. Co. In February, 1865, I boarded at No. 415 Spruce st., and was a clerk in the 7th National Bank of Philadelphia.

Int. 2. Did you, on February 13, 1865, mail two letters from the Seventh National Bank of Philadelphia addressed to the Chicopee Bank, and the Third National Bank respectively, at Springfield, Mass.? If yea, state at what time of the day you put them in the mail, and whether they were mailed together.

(Objected to as leading.)

Ans. I copied two letters on that day, one for the Chicopee Bank, and one I think for the Third National Bank, both at Springfield, Mass., and I took them up to the post office with the rest of the letters before 5 p. m., to the best of my knowledge and belief. They were mailed with the other letters and at the same time.

Int. 3. State if you know the contents of said letters, or either of them, and state whether you mailed any other letters to either of said banks at the same time.

Ans. One of them contained a draft for ($10,000) ten thousand dollars, and with it a letter. I don't think there were any other letters to either of said banks mailed at the same time.

Cross-int. 1. If you say you mailed the letters inquired of in the second direct interrogatory, state from whom you received the same, at what place you received them, on what day, and at what
21 hour of the day.

Ans. I received the letters from Mr. E. S. Hall, the cashier of the 7th National Bank, in his room in the said bank, on the 13th February, 1865, about four o'clock in the afternoon.

Cross-int. Give the directions in full which were upon each of said letters.

Ans. They were directed to the cashiers of the Chicopee Bank and Third National Bank, in Springfield, Mass., respectively. I don't remember the names of the cashiers now. This is to the best of my recollection; all such letters were addressed to the cashiers of banks.

Cross-int. 3. What was the color of the envelope of each of said letters?

Ans. The envelopes were of the ordinary buff colour, I think. They were the stamped government envelope; we had both white and buff ones at that time, but I think these were buff.

Cross-int. 4. Were there any printed words upon either of said envelopes? If so, state what those words were.

Ans. In the left-hand upper corner were printed the words, "Return to the 7th National Bank of Philadelphia, if not called for within ten days." I think this was on these envelopes, almost all our envelopes had this printed on them.

Crost-int. 5. Was the word Mass. upon either or both of
22 said envelopes?

Ans. To the best of my knowledge, the word "Mass." was on both of these envelopes.

Cross-int. 6. Did you make any memorandum at the time you received those letters, or at the time you mailed them? If so, annex such memorandum to your deposition.

Ans. I made no memorandum of these letters, when I received them first from the cashier, or when I mailed them, other than a press copy in the letter-book of the letters accompanying the drafts enclosed in the envelopes.

Cross-int. 7. Where did you place said letters when you first received them, and when did you first take them from the place where you so placed them?

Ans. I first received these letters from the cashier. I then copied them in the press book, and then returned them to the cashier, and a few moments after I took them from his table, and from there directly to the post office.

Cross-int. 8. Did you immediately, upon the receipt of said letters go to the post office? If not, state when you did go, fully and particularly.

Ans. I have answered this in my next preceding answer.

Cross-int. 9. How long was it after you received said letters before you put them in the mail, and how do you know what the
23 length of time was?

Ans. The receiving of these letters from the cashier, the copying of them and the taking to the post office all took place between 4 and 5 p. m. I did not have them in my possession, except for the making of the press copies, at all before I took them to be mailed. I always went to the post office just before 5 p. m., as the mail for New York closed at that time.

Cross-int. 10. If you state in reply to the third direct interrogatory that you know the contents of said letters, or either of them, state how you know said contents and whether you have stated said contents in full.

Ans. I read the letter that was to accompany the draft; it was the regular bank form enclosing drafts for collection. I did not see the draft put into the envelope or the letter itself put in. I copied the letter, then took it to the cashier, for at that time I did not make up the mail, and from his table a few moments after, took it with the rest of the mail to the post office. I paid particular attention to this letter because the draft was for a large amount and drawn by one of our directors.

Cross-int. 11. Has either of the direct or cross-interrogatories propounded to take you deposition been read by or to you, or has the substance of the same or either of the same been communicated
24 to you in any manner whatsoever before they were read to you by the commissioner now taking your deposition? If so, state which of them and the manner in which you became acquainted with the same, of the person so communicating the same.

Ans. Mr. E. S. Hall, the cashier, asked me some two months ago if I remembered having taken these letters to the post office; he also asked me other questions at the same time, but I do not remember now what they were; he has not spoken to me about it since that time; none of these interrogatories or cross-interrogatories, or the substance of them have ever been communicated to me in any other way until this examination.

To the 2d interrogatory, the defendants' counsel noted an objection for from as leading, but the plaintiff did not withdraw or alter the same or put any interrogatory in lieu thereof; when the deposition was offered the defendants renewed their objection to the interrogatory, but it was overruled and the interrogatory and answer admitted.

The defendants then objected to the reading of the third interrogatory and the answer thereto; no objection had been noted to the third interrogatory distinct from that noted to the second; the
25 interrogatory and answer were admitted and the deposition was read to the jury, to which rulings the defendants then and there accepted.

The plaintiff called four witnesses, being the cashiers of the Webster, Suffolk, and First National banks of Boston, and the 3d National Bank of Springfield, Mr. Lincoln, cashier of Webster; Mr. Tyler, cashier of Suffolk Bank; and Mr. Carr, cashier of 1st National, all of Boston; and Mr. Harris, cashier of 3d National Bank of Springfield.

To these gentlemen the following questions respecting usage was put: "Whether or not is there any usage of banks with regard to the collection of paper sent to them by other banks to collect?"

They answered respectively that there was.

The next interrogatory put to the witnesses respectively, was this: "What is that usage?" To this interrogatory the witnesses replied as follows: Mr. Harris, said: "The usage is to collect of the proper parties and remit the proceeds." Mr. Lincoln's reply was, "To collect it—to take the necessary measures to collect it;" in answer to a question from the court he added, "If not paid to protest it, and return it protested." Mr. Tyler's reply was: "It is the custom

26 to collect and remit proceeds if that is requested." To the further question: "What, in case the paper sent is not paid?" he replied, "It is ordinarily protested." Mr. Carr's reply was: "The usage is to collect and remit proceeds or pass them to the credit of the bank." To a further question as to protest, he replied: "To protest and send it to the party under protest."

This was all the evidence offered as to any usage or custom of banks in respect of collecting, remitting, protesting, or notifying other parties on paper sent to them to collect. The defendants proved by Warner, their cashier, and by Montague, the acceptor, that Montague had no funds at the bank for the payment of this draft and made no provision therefor; did not go or send to the bank or make any inquirey in reference to the draft on the day of maturity.

Before the charge def'ts counsel offered the following prayers for instructions to the jury :

Defendant's prayers.

The def'ts pray the court to give the following instructions and rulings :

1. The def'ts are not liable, unless the loss of the bill on the 18th and 20th was owing to a want of ordinary skill and diligence on their part.

27 2. If the loss of the bill was owing to the negligence of the defendants, still the plaintiffs cannot recover unless that loss caused the failure of the plaintiffs to obtain payment from the parties to the bill.

3. If the loss of the bill was owing to the negligence of the defendants, the plaintiffs cannot recover in this action if they had it in their power by reasonable skill and diligence to obviate the effects of that loss and did not do so.

4. If the loss was owing to the def'ts negligence, and the plaintiffs could have fixed the liability of either Rhodes or Coughlin by the exertion of reasonable skill and diligence, so that when the bill was found, either could have been compelled to pay it, and was able to pay the whole or any large portion thereof, the plaintiffs cannot recover in this action and on the present proofs, whether the plaintiffs did or did not so fix their liability.

5. If these banks had had no previous dealings, and the def'ts had not held themselves out as bound to notify endorsers, there was no legal obligation on the defendants to notify the indorsers unless they engaged so to do; there was no such engagement upon the letter of Feb. 13th, and the bill enclosed. The defendants would have discharged their legal duty by due notice (with protest if neces-

28 sary) to the plaintiffs of the dishonor.

6. When a bank which owns an acceptance which is payable at another bank in another place sends it there for collection, and it is dishonored for any cause, the former bank may fix prior parties by notice, and is allowed the same time for receiving notice from its agent as is allowed for notice between parties.

7. Where a bill is payable at a certain bank, and the acceptor has no funds there for payment on the day it falls due, and makes no provision or offer to pay it, it is thereby dishonored, and no demand need be made on the acceptor.

8. In such case it is not necessary in order to fix prior parties that the bill should have been at the bank on the day of payment.

9. If a note is lost so that it is not at the bank at which it is payable on the day of payment and due notice is given to the prior parties of the loss and non-payment in the same time as if the note had been there and been dishonored, their liability can be fixed, so that when the note is found and payment is demanded of the acceptor and refused, they can be compelled to pay.

In this case, if the plff's, at noon of the 20th, knew that the
29 note was lost, and not at the bank on the 18th, and was not paid and gave notice on the 20th or 21st to Rhodes or Coughlin, of the loss and non-payment, the liability of the parties notified was fixed so that he could be required to pay after the note was found and payment refused by the acceptors. And no particular form of notice is necessary if it be such that a business man of ordinary intelligence would infer that it made known these facts for the purpose of securing his obligation to pay.

10. A formal protest was not necessary on this bill to fix the liabilities of prior parties.

11. If a bill is one on which a protest is required, still if the protest cannot be made, the prior parties may be so notified as to held without the protest. Substantially the same reasons excuse want of protest as excuse want of demand as against other parties on the bill. If this is a foreign bill requiring protest, still, if by reason of the loss of the bill on the 18th and 20th, the protest could not be made, the other parties could have been so notified as to be held to their liability on the note being found; and if the plaintiffs, on the 20th or 21st had, or by use of reasonable diligence might have had knowledge that it was not paid, and that protest could not be made by reason of the loss, they could still have so notified
30 Rhodes and Coughlin as to have held them to pay when the note was found and after new demand, refusal and protest.

12. The burden of proof is on the plaintiffs to satisfy the jury upon all the evidence that the loss of the bill was owing to the want of ordinary care and diligence on the part of the defendants.

Also that they have used reasonable care and diligence to obviate the effects of such failure of the defendants in the way of collecting from Rhodes and Coughlin, and from the acceptor.

And the plaintiff's counsel offered the following prayers for instructions to the jury.

Plaintiff's prayers.

1. A bank receiving a draft for collection is bound to make a reasonable demand on the promisor, and in case of dishonor give due notice thereof to the endorser and drawer by having the same protested.

2. In order to charge the drawer and endorser, a demand upon the

26 to collect and remit proceeds if that is requested." To the further question: "What, in case the paper sent is not paid?" he replied, "It is ordinarily protested." Mr. Carr's reply was: "The usage is to collect and remit proceeds or pass them to the credit of the bank." To a further question as to protest, he replied: "To protest and send it to the party under protest."

This was all the evidence offered as to any usage or custom of banks in respect of collecting, remitting, protesting, or notifying other parties on paper sent to them to collect. The defendants proved by Warner, their cashier, and by Montague, the acceptor, that Montague had no funds at the bank for the payment of this draft and made no provision therefor; did not go or send to the bank or make any inquirey in reference to the draft on the day of maturity.

Before the charge def'ts counsel offered the following prayers for instructions to the jury :

Defendant's prayers.

The def'ts pray the court to give the following instructions and rulings :

1. The def'ts are not liable, unless the loss of the bill on the 18th and 20th was owing to a want of ordinary skill and diligence on their part.

27 2. If the loss of the bill was owing to the negligence of the defendants, still the plaintiffs cannot recover unless that loss caused the failure of the plaintiffs to obtain payment from the parties to the bill.

3. If the loss of the bill was owing to the negligence of the defendants, the plaintiffs cannot recover in this action if they had it in their power by reasonable skill and diligence to obviate the effects of that loss and did not do so.

4. If the loss was owing to the def'ts negligence, and the plaintiffs could have fixed the liability of either Rhodes or Coughlin by the exertion of reasonable skill and diligence, so that when the bill was found, either could have been compelled to pay it, and was able to pay the whole or any large portion thereof, the plaintiffs cannot recover in this action and on the present proofs, whether the plaintiffs did or did not so fix their liability.

5. If these banks had had no previous dealings, and the def'ts had not held themselves out as bound to notify endorsers, there was no legal obligation on the defendants to notify the indorsers unless they engaged so to do; there was no such engagement upon the letter of Feb. 13th, and the bill enclosed. The defendants would have discharged their legal duty by due notice (with protest if neces-

28 sary) to the plaintiffs of the dishonor.

6. When a bank which owns an acceptance which is payable at another bank in another place sends it there for collection, and it is dishonored for any cause, the former bank may fix prior parties by notice, and is allowed the same time for receiving notice from its agent as is allowed for notice between parties.

7. Where a bill is payable at a certain bank, and the acceptor has no funds there for payment on the day it falls due, and makes no provision or offer to pay it, it is thereby dishonored, and no demand need be made on the acceptor.

8. In such case it is not necessary in order to fix prior parties that the bill should have been at the bank on the day of payment.

9. If a note is lost so that it is not at the bank at which it is payable on the day of payment and due notice is given to the prior parties of the loss and non-payment in the same time as if the note had been there and been dishonored, their liability can be fixed, so that when the note is found and payment is demanded of the acceptor and refused, they can be compelled to pay.

In this case, if the plff's, at noon of the 20th, knew that the
29 note was lost, and not at the bank on the 18th, and was not paid and gave notice on the 20th or 21st to Rhodes or Coughlin, of the loss and non-payment, the liability of the parties notified was fixed so that he could be required to pay after the note was found and payment refused by the acceptors. And no particular form of notice is necessary if it be such that a business man of ordinary intelligence would infer that it made known these facts for the purpose of securing his obligation to pay.

10. A formal protest was not necessary on this bill to fix the liabilities of prior parties.

11. If a bill is one on which a protest is required, still if the protest cannot be made, the prior parties may be so notified as to held without the protest. Substantially the same reasons excuse want of protest as excuse want of demand as against other parties on the bill. If this is a foreign bill requiring protest, still, if by reason of the loss of the bill on the 18th and 20th, the protest could not be made, the other parties could have been so notified as to be held to their liability on the note being found; and if the plaintiffs, on the 20th or 21st had, or by use of reasonable diligence might have had knowledge that it was not paid, and that protest could not be made by reason of the loss, they could still have so notified
30 Rhodes and Coughlin as to have held them to pay when the note was found and after new demand, refusal and protest.

12. The burden of proof is on the plaintiffs to satisfy the jury upon all the evidence that the loss of the bill was owing to the want of ordinary care and diligence on the part of the defendants.

Also that they have used reasonable care and diligence to obviate the effects of such failure of the defendants in the way of collecting from Rhodes and Coughlin, and from the acceptor.

And the plaintiff's counsel offered the following prayers for instructions to the jury.

Plaintiff's prayers.

1. A bank receiving a draft for collection is bound to make a reasonable demand on the promisor, and in case of dishonor give due notice thereof to the endorser and drawer by having the same protested.

2. In order to charge the drawer and endorser, a demand upon the

acceptor and a protest for non-payment were necessary, and no such demand and protest having been made in the present case, the drawer and endorser were discharged.

3. The mere presence of the note in the bank without the knowledge of the defendants or the acceptors does not constitute
31 a demand and dishonor so as to charge the endorser and drawer, even if there were no funds in the bank belonging to the acceptor.

4. The notice to the pl'fs that a letter containing the draft had "not yet arrived," did not give them any notice that the note had been dishonored, which they could communicate to the drawer and endorser, and thereby charge them with liability.

5. When the loss of the note was discovered on the twentieth of February, no demand as of a lost note could have fixed the endorser and drawer. A lost note must be demanded at maturity.

6. The note being lost, the maker was not bound to pay it or to provide funds for its payment unless a bond of indemnity was tendered him, and in the absence of such tender the note was not dishonored, even if there were no funds in the bank to pay it with at maturity in the bank where it was payable, and the note not having been dishonored at maturity, the endorser could not be charged.

The court declined to give the same as prayed for by the defendants, and instructed the jury as follows; after introductory remarks upon the testimony and its bearing, the court proceeded to instruct the jury upon the matters of law as follows:

32 Some question is made as to the character of the bill of exchange. The rule of law is that a bill of exchange drawn in one State of the United States upon a person resident in another State, is a foreign bill. When both drawer and endorser reside in the same State or country, the bill in general is properly denominated an inland or domestic bill.

Defendants contend that the bill, inasmuch as it was made at Springfield, where the drawers and acceptors reside, and is dated at Springfield, should be regarded as an inland bill not requiring protest, and the court, for the purposes of this trial, so instruct you, unless you find that it was and is the general usage of banks to protest inland bills as well as foreign.

But if you find that it was and is the general usage of banks to protest inland bills when received for collection, then you are instructed that in case of presentment, demand of payment, and refusal, it was the duty of the defendants to have caused protest of the bill as well as to have presented it and demanded payment. Duty of the attorney bank in such cases is, if the bill be a foreign bill, to present the same, demand payment at the proper time, and in case of refusal cause it to be protested, and either to notify the
33 drawer and endorser, or seasonably return the paper to the holder, so as to afford him an opportunity to give such notice.

Where the bill is an inland bill the rule of commercial law, irrespective of the usage of banks, was and is, that the attorney bank, that is the bank receiving the bill for collection, is bound to present the

same and demand payment at the proper time, that is at the maturity of the bill, and either notify the drawer and endorser, or seasonably return the same to the holder, so that he may have an opportunity to give such notice. Protest in the case last named is not necessary unless it is shown that the general usage of banks require it.

Plaintiffs' testimony tends to show that the general usage of banks does require it, and if you believe the testimony and find that there was and is such a general usage requiring protest in all such cases, then you are instructed that it was the duty of the defendants to cause such protest in this case.

Presentment and demand of payment, however, are alike required in both cases, whether the bill be an inland bill or a foreign bill. When due presentment and demand of payment are made, and payment is refused, the duty of the attorney bank is either to give
34 seasonable notice to the drawer and endorser or seasonably to return the bill to the holder, so as to afford him an opportunity to give the notices.

Where a bill is payable at a bank it is not necessary to present it to the acceptor and demand payment of him at any other place. Where the bank is itself the holder of the bill so payable, no formal presentment and demand are necessary, but the bill must be there, as in that case it is the fact that the bill is there in the bank which constitues the presentment, and if the acceptor has no funds there, the rule is that the want of funds and provision for payment is a refusal of payment.

Unless the bill is in the bank at the maturity of the bill payable at the bank there is no presentment of the bill.

The argument of the defendants is, that the fact that the bill was payable at the bank, and that the acceptor had no funds there and did not call at the bank on the day of the maturity of the bill, rendered the presence of the bill in the bank on that day unnecessary in order to constitute a due presentment of the bill; that it was not necessary under those circumstances that the bill should be in the bank at the maturity of the bill to constitute a due present-
35 ment, but the court is of a different opinion, and instruct you, that if the bill was not in the bank on the day of the maturity of the bill so that the bank could not deliver the same if payment had been duly tendered, then due presentment was not made and the bill was not dishonored.

You are also instructed, that if you find that the letter of the 13th of Feb. 1865, with the bill or draft enclosed, was duly conveyed by mail and seasonably received by the defendant bank, to enable the bank to duly present the same and demand payment, as explained in the preceding instructions, that is by keeping the bill in the bank ready to be delivered up in case of legal tender of payment, and that they, the defendants, having lost or mislaid the same, failed and neglected to make due presentment of the same, in that mode or in any way which amounted in law to the dishonor of the bill or draft, then on the facts in this case no legal notice could be given to the drawer or endorser to fix their liability as such, and they became thereby discharged.

Banks, when they receive bills of exchange or negotiable drafts for collection, undertake to take proper measures to collect the same and to remit the proceeds if the same are paid. Their duty
36 is to make due presentment, and demand payment in the manner required by law in the particular case.

Great care should be used in the safe keeping of negotiable paper received for collection, and if lost through their fault and damage ensues therefrom to the owner, they are responsible for the damage.

Corporations necessarily transact their business through authorized agents, and banks act chiefly through their cashiers.

Defendants were bound to exercise reasonable and proper care in guarding against the loss of the bill or draft in this case, and in estimating what was reasonable and proper care, you will take into consideration the nature and importance of the business entrusted to their discretion.

Great care is the ordinary care of prudent men in business of great importance, and in matters of great importance prudent men employ their best exertions.

If you find that the defendants exercised reasonable and proper care in keeping the bill or draft, and that their cashier was not guilty of any negligence in losing it or suffering it to be mislaid, then your verdict should be for the defendants; but it is for your consideration
37 whether if you find that the letter arrived in due course of mail, and was taken out of the post office by the defendants' clerk, and was by him placed on the desk of their cashier; it can be admitted that the manner of losing it or of suffering it to be mislaid, as shown in the testimony, imports no negligence or want of reasonable and proper care. But if you find that the defendants did not exercise reasonable and proper care in keeping the bill or draft, you will then proceed to the other grounds of defence.

Argument for the defendant, is that the plaintiffs cannot recover, because they did not prove their demand in insolvency against the estate of the acceptors under the proceedings in this State, but the court instruct you, that the proof that they did not do so is no defence to this action, in whole or in part. (Defendants abandon this ground of defence.)

You need not consider that defence, but if you find that the bill or draft was duly received by the defendants, and they did not exercise reasonable and proper care in keeping the same, and did not make due presentment thereof and demand of payment at the maturity of the bill or draft, and that the drawer and endorser were thereby discharged, and that the plaintiffs could not collect the same
38 of the acceptors, then your verdict should be for the plaintiffs for such sum and interest from the date of the writ as the plaintiffs lost by the negligence of the defendants.

They are not necessarily liable for the whole amount of the bill or draft, but only for such an amount as the plaintiffs lost by their neglect to make due presentment and demand of payment, if you find that they did so neglect, so that seasonable notice of the refusal of payment could not be given to the drawer and endorser.

At the close of the charge, the counsel for the defendants asked the court to instruct the jury that upon all the evidence in the case the burden was upon the plff's in respect to the negligence of the deft's; but the court refused so to instruct the jury or to give any instructions as to the burden of proof.

And thereupon, before the jury retired from the bar, the defendants excepted as well to the refusal of the court to instruct the jury, as prayed by them, as to the instructions actually given by the court to the jury as hereinbefore set forth, and to the aforesaid rulings of the court; and inasmuch as the matters of the said exceptions of the said defendants do not appear of record in this case, they have
39 prayed the court to sign, seal, and allow this bill of exceptions, which being found in conformity with the truth, has been signed, sealed, and allowed accordingly, and directed to be filed as of the day of the verdict, and before the jury left the bar.

[L. S.] NATHAN CLIFFORD,
Associate Jus. Sup. Ct. U. S.

[L. S.] JOHN LOWELL,
District Judge.

A true record, attest:

JOHN G. STETSON,
Clerk.

40 UNITED STATES OF AMERICA, *District of Massachusetts, ss:*

I, John J. Stetson, clerk of the Circuit Court of the United States for the first circuit and district of Massachusetts, hereby certify that the foregoing is a true copy of the record and of all proceedings in the cause of the Seventh National Bank of Philadelphia, plaintiff, *vs.* The President, Directors and Company of the Chicopee Bank, defendants, in said Circuit Court determined.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court at Boston, in said district, this thirtieth day of November, A. D. 1867, and of the independence of the United States of America the ninety-second.

[SEAL.] JOHN G. STETSON, *Clerk.*

41 Know all men by these presents, that we, the president, directors and company of the Chicopee Bank, a corporation duly created by law and having its place of business at Springfield, in the State and district of Massachusetts, and the Chicopee National Bank, an association formed under the laws of the United States, having its usual place of business at said Springfield, and being the successors to and subject to all the liabilities of said first-named corporations, as principal, and Henry S. Lee and James D. Brewer, both of said Springfield, as sureties, are holden and stand firmly bound and obliged unto the Seventh National Bank of Philadelphia, a corporation duly organized and created by law, and having its place of business in Philadelphia, in our district of Pennsylvania, in the full and just sum of fourteen thousand dollars, to be paid unto the said

Banks, when they receive bills of exchange or negotiable drafts for collection, undertake to take proper measures to collect the same and to remit the proceeds if the same are paid. Their duty
36 is to make due presentment, and demand payment in the manner required by law in the particular case.

Great care should be used in the safe keeping of negotiable paper received for collection, and if lost through their fault and damage ensues therefrom to the owner, they are responsible for the damage.

Corporations necessarily transact their business through authorized agents, and banks act chiefly through their cashiers.

Defendants were bound to exercise reasonable and proper care in guarding against the loss of the bill or draft in this case, and in estimating what was reasonable and proper care, you will take into consideration the nature and importance of the business entrusted to their discretion.

Great care is the ordinary care of prudent men in business of great importance, and in matters of great importance prudent men employ their best exertions.

If you find that the defendants exercised reasonable and proper care in keeping the bill or draft, and that their cashier was not guilty of any negligence in losing it or suffering it to be mislaid, then your verdict should be for the defendants; but it is for your consideration
37 whether if you find that the letter arrived in due course of mail, and was taken out of the post office by the defendants' clerk, and was by him placed on the desk of their cashier; it can be admitted that the manner of losing it or of suffering it to be mislaid, as shown in the testimony, imports no negligence or want of reasonable and proper care. But if you find that the defendants did not exercise reasonable and proper care in keeping the bill or draft, you will then proceed to the other grounds of defence.

Argument for the defendant, is that the plaintiffs cannot recover, because they did not prove their demand in insolvency against the estate of the acceptors under the proceedings in this State, but the court instruct you, that the proof that they did not do so is no defence to this action, in whole or in part. (Defendants abandon this ground of defence.)

You need not consider that defence, but if you find that the bill or draft was duly received by the defendants, and they did not exercise reasonable and proper care in keeping the same, and did not make due presentment thereof and demand of payment at the maturity of the bill or draft, and that the drawer and endorser were thereby discharged, and that the plaintiffs could not collect the same
38 of the acceptors, then your verdict should be for the plaintiffs for such sum and interest from the date of the writ as the plaintiffs lost by the negligence of the defendants.

They are not necessarily liable for the whole amount of the bill or draft, but only for such an amount as the plaintiffs lost by their neglect to make due presentment and demand of payment, if you find that they did so neglect, so that seasonable notice of the refusal of payment could not be given to the drawer and endorser.

At the close of the charge, the counsel for the defendants asked the court to instruct the jury that upon all the evidence in the case the burden was upon the plff's in respect to the negligence of the deft's; but the court refused so to instruct the jury or to give any instructions as to the burden of proof.

And thereupon, before the jury retired from the bar, the defendants excepted as well to the refusal of the court to instruct the jury, as prayed by them, as to the instructions actually given by the court to the jury as hereinbefore set forth, and to the aforesaid rulings of the court; and inasmuch as the matters of the said exceptions of the said defendants do not appear of record in this case, they have
39 prayed the court to sign, seal, and allow this bill of exceptions, which being found in conformity with the truth, has been signed, sealed, and allowed accordingly, and directed to be filed as of the day of the verdict, and before the jury left the bar.

[L. S.] NATHAN CLIFFORD,
Associate Jus. Sup. Ct. U. S.

[L. S.] JOHN LOWELL,
District Judge.

A true record, attest:

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Clerk.

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In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court at Boston, in said district, this thirtieth day of November, A. D. 1867, and of the independence of the United States of America the ninety-second.

[SEAL.] JOHN G. STETSON, *Clerk.*

41 Know all men by these presents, that we, the president, directors and company of the Chicopee Bank, a corporation duly created by law and having its place of business at Sprinfield, in the State and district of Massachusetts, and the Chicopee National Bank, an association formed under the laws of the United States, having its usual place of business at said Springfield, and being the successors to and subject to all the liabilities of said first-named corporations, as principal, and Henry S. Lee and James D. Brewer, both of said Springfield, as sureties, are holden and stand firmly bound and obliged unto the Seventh National Bank of Philadelphia, a corporation duly organized and created by law, and having its place of business in Philadelphia, in our district of Pennsylvania, in the full and just sum of fourteen thousand dollars, to be paid unto the said

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Great care should be used in the safe keeping of negotiable paper received for collection, and if lost through their fault and damage ensues therefrom to the owner, they are responsible for the damage.

Corporations necessarily transact their business through authorized agents, and banks act chiefly through their cashiers.

Defendants were bound to exercise reasonable and proper care in guarding against the loss of the bill or draft in this case, and in estimating what was reasonable and proper care, you will take into consideration the nature and importance of the business entrusted to their discretion.

Great care is the ordinary care of prudent men in business of great importance, and in matters of great importance prudent men employ their best exertions.

If you find that the defendants exercised reasonable and proper care in keeping the bill or draft, and that their cashier was not guilty of any negligence in losing it or suffer it to be mislaid, then your verdict should be for the defendants; but it is for your consideration
37 whether if you find that the letter arrived in due course of mail, and was taken out of the post office by the defendants' clerk, and was by him placed on the desk of their cashier; it can be admitted that the manner of losing it or of suffering it to be mislaid, as shown in the testimony, imports no negligence or want of reasonable and proper care. But if you find that the defendants did not exercise reasonable and proper care in keeping the bill or draft, you will then proceed to the other grounds of defence.

Argument for the defendant, is that the plaintiffs cannot recover, because they did not prove their demand in insolvency against the estate of the acceptors under the proceedings in this State, but the court instruct you, that the proof that they did not do so is no defence to this action, in whole or in part. (Defendants abandon this ground of defence.)

You need not consider that defence, but if you find that the bill or draft was duly received by the defendants, and they did not exercise reasonable and proper care in keeping the same, and did not make due presentment thereof and demand of payment at the maturity of the bill or draft, and that the drawer and endorser were thereby discharged, and that the plaintiffs could not collect the same
38 of the acceptors, then your verdict should be for the plaintiffs for such sum and interest from the date of the writ as the plaintiffs lost by the negligence of the defendants.

They are not necessarily liable for the whole amount of the bill or draft, but only for such an amount as the plaintiffs lost by their neglect to make due presentment and demand of payment, if you find that they did so neglect, so that seasonable notice of the refusal of payment could not be given to the drawer and endorser.

At the close of the charge, the counsel for the defendants asked the court to instruct the jury that upon all the evidence in the case the burden was upon the plff's in respect to the negligence of the deft's; but the court refused so to instruct the jury or to give any instructions as to the burden of proof.

And thereupon, before the jury retired from the bar, the defendants excepted as well to the refusal of the court to instruct the jury, as prayed by them, as to the instructions actually given by the court to the jury as hereinbefore set forth, and to the aforesaid rulings of the court; and inasmuch as the matters of the said exceptions of the said defendants do not appear of record in this case, they have
39 prayed the court to sign, seal, and allow this bill of exceptions, which being found in conformity with the truth, has been signed, sealed, and allowed accordingly, and directed to be filed as of the day of the verdict, and before the jury left the bar.

[L. S.] NATHAN CLIFFORD,
Associate Jus. Sup. Ct. U. S.

[L. S.] JOHN LOWELL,
District Judge.

A true record, attest:

JOHN G. STETSON,
Clerk.

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In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court at Boston, in said district, this thirtieth day of November, A. D. 1867, and of the independence of the United States of America the ninety-second.

[SEAL.] JOHN G. STETSON, *Clerk.*

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Seventh National Bank of Philadelphia, its successors, or assigns; to which payment well and truly to be made, we bind ourselves, heirs, executors, and administrators, firmly by these presents.

Sealed with our seal, dated the thirtieth of November, in the year of our Lord one thousand eight hundred and sixty-seven.

Approved:

JOHN LOWELL, *Judge.*

The condition of this obligation is such that whereas lately, to wit, at the October term., A. D. 1867, of the Circuit Court of the United States for the first circuit and district of Massachussetts, at Boston, in a suit depending in said court between said Seventh National Bank of Philadelphia and said president, directors and company of the Chicopee Bank, judgment was rendered against said president, directors and company of the Chicopee Bank, and said president, directors and company of the Chicopee Bank having obtained a writ of error, and filed a copy thereof in the clerk's office of said Circuit Court to reverse the judgment in the aforesaid suit, and a citation directed to said Seventh National Bank of Philadelphia, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such that if the said president, directors and company of the Chicopee Bank shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

[L. S.] T. WARNER JR.,
Cashier Chicopee Bank.

[L. S.] T. WARNER JR.,
Cashier Chicopee N. Bank.

[L. S.] HENRY S. LEE.

[L. S.] JAMES D. BREWER.

SEAL OF CHICOPEE NAT'L BANK.

Sealed and delivered in presence of—
A. B. WEST.

Approved:

GEO. PUTNAM, JR.,
Att'y for Pl'ffs.

Endorsed: 7 Nat'l B'k of Phil'a vs. P. D. & Co. Chicopee B'k. No. 363. U. S. C. C. Mass. Dist., *ss.* A true copy of bond to prosecute in above-entitled cause. Att. John G. Stetson, clerk. Filed 10 Dec'r, 1867.

42 The United States of America to the Seventh National Bank of Philadelphia, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the first Monday of December next,, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, Massachusetts district, wherein the president, directors and company of the Chicopee Bank are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John Lowell, judge of the Circuit Court of the United States, district of Massachusetts, this thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty-seven.

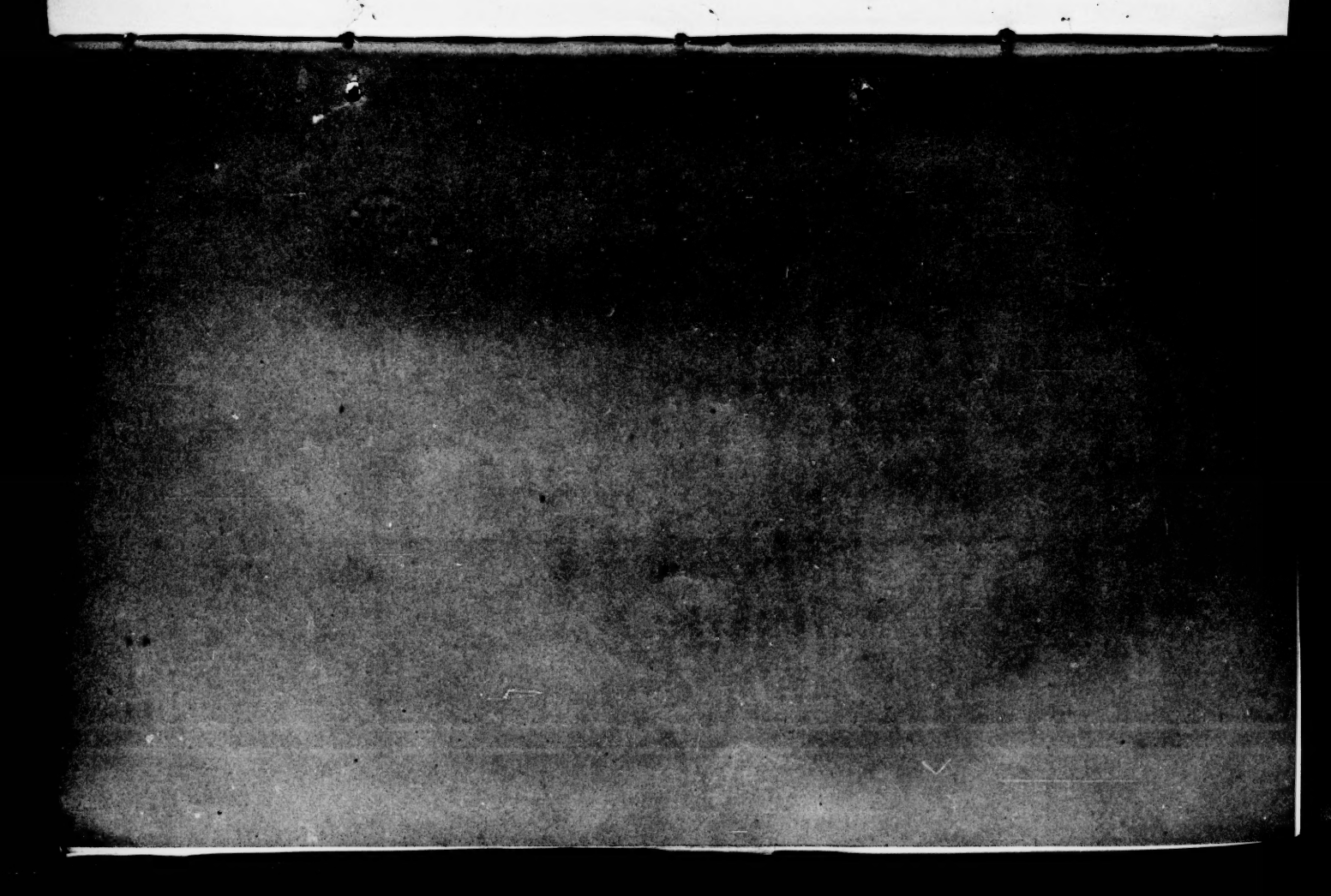
JOHN LOWELL,
Judge Circuit Court of the U. S., Mass. Dist.

BOSTON, *November 30th*, 1867.

I hereby acknowledge due, sufficient and legal service of the above citation, and I acknowledge service of the writ of error aforesaid by a copy thereof being this day lodged for the defendant in error in the clerk's office, where the record remains.

GEO. PUTNAM,
Att'y of Seventh Nat'l Bank of Phil'a.

Endorsed: 7 Nat'l B'k of Phil'a vs. P. D. & Co. Chicopee B'k. No. 363. Original citation and acknowledgment of service. Filed 10 December, 1867.



Supreme Court of the United States.

NOVEMBER, 1869.

CHICOPEE BANK, PLAINTIFF IN ERROR, *vs.* SEVENTH NATIONAL BANK OF PHILADELPHIA.

POINTS OF PLAINTIFF IN ERROR.

FACTS FOUND OR AGREED.

A bill of exchange was accepted by a citizen of Springfield, Massachusetts, specially payable at the Chicopee Bank of that place. The Philadelphia Bank was the owner of the bill, and sent it by mail to the Chicopee Bank, at which it was payable, to receive payment. The relation between the two banks was that of principal and agent. The acceptance was payable Saturday, February 18, 1865. The relations between the Philadelphia Bank and the prior parties on the bill, viz: Mr. Coughlin, the drawer, and Mr. Rhodes, the indorser, were intimate; Rhodes had large dealings with the bank, Coughlin was a director, both were frequently at the bank, the cashier (Mr. Hall), was well acquainted with them, and he received this bill directly from Rhodes. He knew that Rhodes and Coughlin were engaged in dealings in petroleum lands, on which this bill was founded. (Record pp. 8, 9, 10.) The bill was duly delivered, through the mail, at the Chicopee Bank, and was placed on the desk of the cashier, and was in the bank on the 18th. The acceptor neither provided for, nor called for the bill, and did not intend to pay it. He was as much in default as any acceptor can be. (Record, pp. 18, 19.)

The Philadelphia Bank, at noon of the twentieth, knew enough to enable it to notify the prior parties, or if it desired to know the

facts as to the action of the acceptor, it could have obtained them in season. Notice given on the 23d would have been seasonable. (Between principal and agent, any means of communication are sufficient.)

The case of the Philadelphia Bank rests solely on the allegation that, by the fault of the Chicopee Bank, it lost the power to hold the prior parties. (Declaration, p. 5.)

LAW AND RULINGS.

There was no question at the trial, and the Court ruled that in a case of principal and agent like this, the prior parties can be held by a notice from the principal, as well as from the agent. The case was placed upon the ground that the prior parties *could not be held by any notice, from whomever received, or whenever, or however.* All question of notice, therefore, may be thrown out of the case.

The question is simply this, were the prior parties absolutely discharged by what was done or omitted at the Chicopee Bank, on the eighteenth?

APPLICATION.

As to what was done or not done there, the record finds only these facts. The bill was delivered at the bank by the mail, before the eighteenth, and placed on the cashier's desk. No call or provision was made for it by the acceptor. When the cashier was asked, on the twentieth, by the Philadelphia Bank, he did not know that the bill had been in his bank on the eighteenth. These are all the facts bearing on the discharge of the prior parties.

Nothing done or omitted by the Chicopee Bank caused or contributed to the default of the acceptor.

It cannot be assumed that if the acceptor had called for the bill on the eighteenth, or had made provision for it, it would not have been found. It may be assumed that the call or provision would have stimulated the cashier to a search and led to telegraphic communications between the bank and its principal.

These might have resulted, if not in the finding of the bill, at least in a presentment of a substantial copy with security.

The ruling of the Court can be sustained only on this proposition.

Where the acceptor has neither provided nor called for the bill at the bank at which he agreed to pay it, the prior parties, although duly notified, may escape payment on the ground that, although the bill was duly sent to the bank by the owner and was there on the day of payment, the bank did not know it was there, — nothing having occurred to call its attention to the subject, and it being entirely uncertain whether the bank would or would not have ascertained it had the acceptor not been in default, or might or might not have made a presentment by copy and with security.

We respectfully suggest that the instructions erred in assuming, absolutely, that if the acceptor had called for the bill the bank was and must have been without means of meeting his rights.

We do not find any case or opinion of the commentators to meet such a state of facts as this. The cases cited on the other side will be found to be those of an individual owner and legal holder who has attempted a personal presentment, or otherwise neglected to place the bill at the bank for payment; or they are the statement of what the holder must be prepared for, in case the acceptor should call.

We respectfully submit the two following propositions:

I.

THE PRIOR PARTIES ON A BILL ACCEPTED PAYABLE AT A PARTICULAR BANK, IF THEIR ACCEPTOR IS IN DEFAULT, AND THEY ARE DULY NOTIFED, CANNOT DEFEND THEMSELVES AGAINST THE OWNER OF THE BILL UNLESS IT APPEARS THAT SOME ACT OR OMISSION OF THE OWNER OR HIS AGENT IN SOME WAY CAUSED OR CONTRIBUTED TO THAT DEFAULT.

If the above is not maintained, then

II.

ON A BILL OF EXCHANGE ACCEPTED PAYABLE AT A PARTICULAR BANK, WHERE THE BILL HAS DULY BEEN SENT TO THE BANK AND IS IN THE BANK THROUGH THE DAY OF PAYMENT, AND THE ACCEPTOR MAKES NO PROVISION OR CALL, AND THE PRIOR PARTIES ARE DULY NOTIFIED BY THE OWNER OF THE BILL, THEY CANNOT DEFEND ON THE MERE GROUND THAT IT APPEARED AFTERWARDS THAT THE OFFICERS OF THE BANK DID NOT IN FACT KNOW IT WAS THERE ON THE DAY OF PAYMENT.

If the authorities have not actually decided, they establish doctrines that lead to the decision that, as between the prior parties on a bill accepted payable at a particular bank and the holder, the prior parties are held, if the acceptor does nothing towards payment, unless some neglect of the holder causes or contributes to his default, or puts them to material disadvantage.

U. S Bank vs. *Smith*, 11 Wheat. 121.
Folger vs. *Chase*, 18 Pick. 63.
Lockwood vs. *Crawford*, 18 Conn. 361.
State B'k. vs. *Napier*, 6 Humphrey, 270.
Smith vs. *Rockwell*, 2 Hill, 482.
Windham B'k. vs. *Norton*, 22 Conn. 214.
1 *Parsons on N. & Bills*, 368, 437; 435, note W.

USAGE.

It does not appear from the record whether the jury found the usage upon which his Honor instructed them, and under the rulings they may well have found their verdict without considering the usage, for their verdict was required for the plaintiffs below if the note was lost (or not known to be there) by negligence of the cashier.

THE BURDEN OF PROOF.

The plaintiffs below could not have recovered, unless the jury were satisfied of the negligence of the defendants. The facts show that the point was one fit for a jury to pass upon; and

if there was any burden of proof resting on the plaintiffs, it was the defendants' right that the jury should be so informed. The existence and character of the burden of proof are matters of pure law, which the jury can learn only from the Court. A jury left to itself, is very apt to confound a *prima facie* case with the burden of proof. In this instance, they may have thought, and it is enough if one of them thought, that certain facts, or a single fact, as the long existence of the crack in the desk, or the bill not being known by the cashier to be in the bank, threw upon the bank the burden of disproving negligence. It can never be known that the necessary unanimity of the jury was not owing to the refusal of the judge to give them any instructions as to the burden of proof. (Record, p. 38.)

R. H. DANA, JR., *For the Plaintiff in Error.*

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Fullerton v Bk of U. States 1 Pet. 604
Merchants' Bk v Elderkin 25 N.Y. 178
Whitbeck v Cook 15 Mich. 483
Bk of U.S. v Carneal 2 Pet. 540

Supreme Court of the United States.

OCTOBER TERM, 1869.

CHICOPEE BANK, IN ERROR, *vs.* SEVENTH NATIONAL BANK OF PHILADELPHIA.

Brief of Plff in Error.

STATEMENT OF CASE.

This is an action for negligently failing to take proper steps to collect a bill of exchange sent by plaintiffs to defendants for collection.

The plaintiffs, a Philadelphia bank, discounted, February 13, 1865, for one C. C. Rhodes, a bill of exchange, dated at Springfield, Mass., February 11, 1865, directed to Montague & Son, Springfield, requesting them to pay $10,000, in five days after sight, to the order of C. C. Rhodes, at the defendant bank, signed by one S. B. Coughlin, of Philadelphia, as drawer, accepted by Montague & Son on the same day, and endorsed by said Rhodes. February 13, 1865, the plaintiffs sent the bill by mail to the defendant bank for collection. The jury have found that the letter containing the bill reached the defendant bank in season to enable them to make the collection or to have taken steps to charge the drawer and endorser, but that through the negligence of the defendant bank the bill was lost or mislaid; no demand was made or protest or other notice of non-payment given in season to hold the drawer and endorser, who were able to pay the bill, but refused to do so, and that in consequence

of this negligence the defendants in error suffered damages to the amount found in the verdict.

The evidence reported in the bill of exceptions showed that the letter containing the bill slipped through a crack in the top of the desk of the defendants' cashier, and remained there undiscovered for something over two months; that on the 20th of February, the Monday after the Saturday on which the bill should have been paid, the plaintiffs telegraphed defendants to know if it had been paid, and received for reply only the words "Not yet received"; that plaintiffs immediately wrote defendants, and also made inquiries in every direction, through the post-office, for the missing letter, but without effect, until it was found on the 18th of April in the waste-paper drawer under the desk of defendants' cashier. The acceptors proving worthless, and the drawer and indorser being discharged in consequence of the want of demand and protest, or other proper notice, this suit was brought against the defendants with the above result.

Judgment having been entered upon the verdict, the plaintiffs in error undertake upon this record to satisfy this Court that it was based upon erroneous views of the law. There are no questions as to the admissibility of evidence, except a single one, which will be considered by itself.

I.

It seems to be conceded by the defendants (prayers for rulings, pp. 12, 13), that if their negligence in the performance of their duty, as a collecting bank, did in fact cause the discharge of the drawer and endorser, they are liable in damages in the amount of the loss sustained by the plaintiffs in consequence of such discharge.

Such, at all events, is the law.

Bowling *vs.* Harrison, 6 How. 248, 258.

Smedes *vs.* Utica Bank, 20 Johns. 372.

Bank of Wash^n v. Triplett, 1 Pet. 25, 30.

Fabens *vs.* Mercantile Bank, 23 Pick. 332.
Mechanics' Bank *vs.* Merch. Bank, 6 Met. 20.

II.

The argument of the defendants, as embodied in their prayers for rulings, pp. 13, 14, seems to be that inasmuch as the bill was payable at the defendant bank, no presentment was necessary; that it was the duty of the acceptor to have funds at the bank ready to meet the bill as it matured; that as the funds were not there, and as the surviving acceptor testified that neither he, nor so far as he knew, his partner, provided for the draft, or went to the bank on the day it fell due, the bill was dishonored on the eighteenth by the failure of the acceptor to provide funds to meet it; that the telegram of the twentieth, "not yet received," was sufficient notice to the plaintiffs of the dishonor of the note to enable them to charge the endorsers, and that therefore the loss of the bill did not damage the plaintiffs, who might still have held the drawer and endorser.

The Court, however, ruled that although the bill being payable at the defendant bank, need not be presented to the acceptor elsewhere, yet it must be in the bank ready for delivery upon funds being provided for its payment. As it was not contended that the presence of the bill in the cashier's waste-paper drawer, unknown to anybody, was a presence ready for delivery on payment, this ruling was in effect a ruling that the bill was not dishonored.

The Court also ruled that although the bill in question was not a foreign bill, and although inland bills need not ordinarily be protested, yet if the jury found (upon the evidence reported, pp. 11, 12, and admitted without objection) that it was the general usage of banks to protest inland bills when received

for collection, then it was the defendants' duty to have protested this bill for non-payment.

No ruling was made upon the effect of the telegram "not yet received," as a notice of dishonor.

The only other matters in the charge material to be considered, are the rulings as to the degree of care required of the defendants (p. 16), and the refusal to instruct the jury as to the burden of proof (p. 17).

III.

The ruling in relation to the effect of a usage to protest bills sent for collection by one bank to another was correct. It was the duty of the defendant bank to do what is usually done by collecting banks with negotiable paper sent to them for collection. The extent of their duty can only be shown by showing what is usually done in such cases, and they are only liable in damages for failing in their duty as so defined. It was therefore competent to show by the testimony of bank officers what is the usual course pursued by banks situated as the defendant bank was in this case. Three witnesses testified that it was customary to make demand, and if the paper was not paid, to protest it. As this testimony was uncontrolled it was competent for the jury to find that such was the custom; and, if they did so find, that custom was rightly ruled to measure the duty of the defendant bank.

The cases deciding that a usage to adopt a doctrine different from the settled rule of law is not binding have no application to this case, because the evidence upon which the ruling complained of was made was evidence of a practical course of conduct, not of a prevalent opinion as to the law.

Dickinson *vs.* Gay, 7 Allen, 35-37.

Bank of Washington *vs.* Triplett, 1 Peters, 25.
Renner *vs.* Bank of Columbia, 9 Wheat. 582.

IV.

But even if the ruling about usage was wrong there ought not to be a new trial, because the result could not have been different if the ruling had not been made.

The evidence of usage was not objected to, only the ruling as to its effect. It cannot therefore be claimed that improper evidence went to the jury. And if no ruling on the question of the duty of the bank to protest bills of exchange had been made, the position of the defendants would not have been altered. The case finds (p. 4) that all the correspondence in relation to the bill is reported, and no demand and notice such as to charge the indorsers was shown. The Court should therefore have ruled as requested by plaintiffs in their third and fourth prayers for rulings. Rep. p. 14 [31].

The argument of the defendants was, that as there were no funds of the acceptors in the bank where the bill was payable the bill was dishonored; but the Court ruled that unless the bill was in the bank ready to be delivered up at maturity, the absence of funds to pay it with, did not constitute dishonor. (p. 15) R. 15 of this ruling was right; the question whether the bill should have been protested or not is immaterial, for if the bill was not dishonored, it could make no difference whether the defendants were bound to protest it or not. The indorsers would have been discharged if it had been protested.

The ruling as to the usage to protest can therefore only be material, in case the Court shall be of opinion that the ruling in relation to what constitutes dishonor was wrong, and if that ruling was wrong there must be a new trial in any event.

If that ruling was right the verdict must stand, whatever may have been the true rule as to the effect or validity of the usage proved.

The ruling on this point was as follows: p. 15. "Where a bill is payable at a bank, it is not necessary to present it to the acceptor, and demand payment of him at any other place. Where the bank is itself the holder of the bill so payable, no formal presentment and demand are necessary, but the bill must be there, as in that case it is the fact that the bill is there in the bank which constitutes the presentment, and if the acceptor has no funds there, the rule is, that the want of funds and provision for payment is a refusal of payment. Unless the bill is in the bank at the maturity of the bill payable at the bank there is no presentment of the bill. * * * * * if the bill was not in the bank on the day of the maturity of the bill so that the bank could not deliver the same if payment had, been duly tendered, then due presentment was not made and the bill was not dishonored."

These instructions are precisely in accordance with the authorities.

1 Pars. B. & N. 437.
Fullerton *vs.* Bank of U. S. 1 Pet. 604.
Bank of U. S. *vs.* Carneal 2 Pet. 543, 549.

The position of the defendants is believed to be wholy unsupported by authority and must stand upon principle if at all.

But it seems to be as unfounded in principle as in authority.

Ordinarily a bill is not dishonored unless it is presented to the acceptor and payment refused or neglected. Both acts must concur. There must be both presentment by the holder and a neglect or refusal to pay by the acceptor.

When a bill is payable at a bank the presence of the bill in the bank takes the place of presentment and the failure to provide funds to meet it takes the place of refusal. But the failure to provide funds does not take the place of presentment any more than if the bill is not payable at the bank. If the mere absence of provision for payment excused demand, then de-

mand would be unnecessary in case of the acceptor's insolvency or of his having absconded or even of his having announced his intention not to pay. But these circumstances do not excuse demand. Lee Bank v. Spencer, 6 Met. 308.

1 Pars. B. & N. 446, *et seq.*

Peirce *v.* Cate, 12 Cush. 190, overruling previous contrary decisions. & See Merchants Bank v. Hyde, 16 Pick Sanford v. Dewey 10 Mass. 52 392

The acceptor is not bound to have funds in the bank unless the bill is there. He is not bound to have them on deposit. He may bring them at any time before the day of maturity is closed. If the bill is not in the bank he need not bring his money for he is not obliged to pay it until demanded.

In the present case the acceptor may have found out by some means that the bill had not come and so have neglected to provide funds to meet it.

V.

Even if a demand on the acceptor, and a refusal of payment by him sufficient to dishonor the note were shown, no notice of dishonor was given to the plaintiffs, to enable them to hold the drawer and indorser.

Defendants rely for proof of notice on the telegram of the twentieth, in answer to the plaintiffs' inquiry by telegraph whether the bill had been received. That telegram contained only the words, "Not yet received."

These words do not constitute notice of dishonor.

They rather imply that no demand has been made, and therefore that there has been no dishonor.

And even if the position of defendants was sound, that the absence of funds provided by the acceptor for the payment of the bill did, in fact, dishonor the bill without its presence in the bank, the words "Not yet received" do not inform the plaintiffs of

the absence of such funds. On the contrary, by omitting to say that there is no provision for paying the bill, they raise the inference that if the bill was there it would be paid.

In short, the absence of funds is the only evidence of dishonor relied on by the defendants, and the only notice relied upon neither states nor by any reasonable intendment implies, such absence of funds.

Gilbert *vs.* Dennis, 3 Met. 506.
Lewis *vs.* Gompertz, 6 M. & W. 399.
Parsons on B. & N. 469, and note.
Ransom *vs.* Mack, 2 Hill, 587, 593.
Bank of U. S. *vs* Carneal, 2 Pet., 543.

VI.

Nor could the plaintiffs have held the drawer and indorser as upon a lost note.

A lost bill or note must be demanded at its maturity, and notice given to the drawer and indorser, with offer of indemnity to all parties. The requirements are precisely the same as if the note were not lost.

2 Parsons, Bills and Notes, 260, and cases cited.
See also Tuttle *vs.* Standish, 4 Allen, 481.

In this case, by the neglect of the defendants, the bill was lost at the time it was due, and the loss was not discovered until after the time for demand and notice had gone by.

No case has been found presenting similar facts to the present; and it need not be argued that circumstances might not arise where the loss of a bill by unavoidable casualty would be held to excuse demand and protest until a reasonable time after the loss was discovered. But where, as in the present case, the loss was due to the negligence of the holder's agent, it is difficult to see why the indorser's contract should be modified.

That contract is a conditional one — to pay in case demand shall be made, on a particular day, and due notice given of non-payment.

Peirce *vs.* Cate, 12 Cush. 190.
U.S. Bank v. Smith 11 Wheat. 171. 175

If any circumstances can excuse the performance of a condition precedent, surely they must be circumstances for which the party in default is not to blame. No breach of condition can be excused by the neglect of the party himself or his agent.
Windham Bank v. Norton, 22. Conn. 214,

VII.

The refusal of the Court to rule upon the burden as to the plaintiffs' negligence, is not a subject of exception.

1. It was a matter wholly in the discretion of the Court.

2. To have instructed the jury as requested by the plaintiffs, "that upon all the evidence in the case, the burden was upon the plaintiffs, in respect to the negligence of the defendants," could have had no effect, unless to mislead them.

There was no conflicting evidence as to a disputed fact which might leave a doubt on the minds of the jury to be solved by determining upon whom was the burden of proof. It was admitted that the letter slipped through a crack in the cashier's desk (Report, p. 7), and the question for the jury was whether the loss of the letter in that manner amounted to negligence. Upon a question of this character, the burden of proof has no bearing. It was one to be determined upon other considerations, which were fully set forth by the Court in another part of the charge — p. 16.

If the instruction asked for had been given, the jury might properly have inferred that there was a burden of proof upon the plaintiffs, to show that the facts proved constituted negligence. But that is a matter of judgment and opinion, not of proof.

3. The ruling was, if anything, too favorable to the defendants.

The Court might well have ruled that if the jury found (as they must have found upon the evidence) that the letter containing the bill reached the defendants in season for presentment, and was lost by the defendants, so that they were unable to present it at maturity, these facts made a *prima facie* case of negligence, which the defendants must rebut.

Stokes *vs.* Saltonstall, 13 Pet. 181.

VIII.

The instructions as to the degree of care which the defendants were bound to exercise and the want of which would constitute negligence, were exactly in accordance with the authorities.

New World *vs.* King, 16 How. 469.
Stokes *vs.* Saltonstall, 13 Pet. 181.
Wilson *vs.* Brett, 11 M. & W. 113.
Beal *vs.* So. Devon R. Co. 3 H. & C. 337.
Grill *vs.* Iron Screw Co. L. R. 1 C. P. 600.
Readhead *vs.* Midlands R. Co. L. R. 4 Q. B. 379.
Bank of Wash^n v. Triplett, 1 Pet. 31.

IX.

The deposition of Thomas S. Harris was rightly admitted.

The only objection raised was the alleged leading character of the second interrogatory.

1. The permission of leading questions is a matter wholly in the discretion of the Court.

No case has been found in which a verdict has been set aside because a leading question was permitted to be put at the trial. Where a question has been ruled out as leading new trials have

been allowed when the Court of Appeal has been of opinion that the objection was unfounded, because in such a case the effect of the ruling was to exclude evidence which should have gone to the jury. But to order a new trial because evidence perfectly admissible and pertinent to the issue has been permitted to be drawn out by questions objectionable in form, would be a novel interference with the discretion which usage permits to the judge presiding at the trial, and would tend to defeat justice upon purely technical grounds.

2 Phillips Evidence, 888, 892, n.
1 Greenleaf Evidence, §§ 431, 434, 74.
York *vs.* Pease, 2 Gray 282.

2. But the question objected to could not in fact have been properly ruled out as leading.

It can make no difference that the testimony was taken by deposition. The admissibility of the question must be determined by the same considerations as if the witness had been upon the stand.

It was proved by other testimony that the two letters inquired about had been sent by the plaintiffs' cashier on the 13th (p. 4); that the letter to the Third National Bank had been received on the fifteenth, and that the letter to the defendants had come by mail at some time or other. The first branch of the second interrogatory assumed these facts as proved, and asked if the deponent was the person who mailed the letters. This part of the question was merely preliminary. The only material points to be proved by this witness were embraced in the remainder of the question, viz: the hour at which the letters were mailed, and whether they were mailed together. The language in which these questions are put does not in any way suggest the expected answer.

The question, then, is substantially this: "Are you the person who mailed the letters to the Springfield Banks, which Mr.

Hall has testified that he caused to be mailed, February 13? If yea, state at what time of day you put them in the mail, and whether they were mailed together." If the witness had been on the stand the first branch of this inquiry would have been regarded as no more leading than was reasonable in order to call attention to the general subject without too great waste of time. And the second branch which is the material part of the question is clearly not leading.

3. The first branch of the question is not in fact objectionable as leading, because though leading in form it leads not to the answer expected and desired, but to the contrary answer. Thus the words "did you mail," etc., suggest by their form negative answer. To lead to an affirmative answer the words should be "did you *not* mail, etc."

GEO. PUTNAM, JR.,
For Plaintiffs. (*Defendants in Error.*)